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Nos. 83-696 and 83-713

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD J. MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause, petitioners' prior acquittals on RICO charges foreclosed the government from alleging one of the predicate acts of racketeering charged in the instant RICO indictment.

2. Whether the government is collaterally estopped by petitioners Marino's prior acquittals from proving that, from 1971 to 1973, Marino participated in the enterprise charged in the present indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17)[1] is reported at 717 F.2d 27. The opinion of the district court (Pet. App. A19-A34) is reported at 555 F. Supp. 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1983. The petitions for a writ of certiorari were filed on October 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition in No. 83-696.

STATEMENT

1. In an indictment filed in the United States District Court for the Western District of New York on November 8, 1982, petitioners and eight others were charged with participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c), and with conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d). The indictment alleged that petitioners and their co-defendants engaged in a scheme to extort money from Rochester, New York, gambling clubs, to use threats, murder and arson against their competitors, and to avoid detection by committing other illegal acts, including murder and obstruction of justice. The pattern of racketeering activity was alleged to have occurred from October 1973 to December 17, 1981. The life of the enterprise was alleged to have run from February 1, 1971, until the date of the indictment.

Five years earlier, in October 1977, petitioners were acquitted of violating 18 U.S.C. 1962(c) and (d) under another indictment filed in 1976. That indictment alleged that petitioners and six others — none of whom was also charged in the 1982 indictment — had engaged in a scheme to commit arson and to defraud insurance companies by means of false representations as to the facts and circumstances surrounding the fires. The pattern of racketeering activity was alleged to have occurred from January 26, 1970, to March 17, 1973. The life of the enterprise allegedly ran from June 1, 1969, to August 31, 1973.

2. Petitioners moved to dismiss the instant indictment. They claimed, inter alia, that the government is seeking to punish them for the same offenses of which they previously were acquitted, in violation of the Double Jeopardy Clause. They also contended that the government is collaterally estopped from litigating the issue whether they were

members of the alleged enterprise because that issue necessarily was decided in their favor as a result of their prior acquittals. The district court denied the motions (Pet. App. A19-A34).

On petitioners' interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), the court of appeals affirmed (Pet. App. A1-A17). With respect to petitioners' double jeopardy claim, the court held that, "in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment" (*id.* at A12) (emphasis in original). The court went on to determine (*id.* at A14) that, even assuming the two indictments charged the identical enterprise, the patterns of racketeering activity were clearly distinct. In particular, the court considered it significant that the 1976 indictment concerned a scheme to defraud insurance companies by deliberately setting fires to insured buildings and collecting the insurance proceeds, whereas the present indictment is directed at a scheme whose primary objective was to extort money from gambling clubs (*id.* at A13).

The court of appeals rejected petitioners' contention that the government was barred from charging one of the racketeering acts alleged in the 1982 indictment — the 1973 murder of Jimmy Massaro — because it could have been charged in the 1976 indictment (Pet. App. A15). The court concluded that "the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme* — a scheme which had no relationship to the 1976 arson-for-hire activity" (*ibid.*) (emphasis in original).

Finally, the court of appeals rejected petitioners' claim that the government was collaterally estopped by the earlier acquittals from proving that petitioners were members of the alleged enterprise. First, the court concluded that the two enterprises were "wholly different" (Pet. App. A16). Beyond that, the court determined that, even assuming that the enterprises in each indictment were the same, "[t]he acquittal of [petitioners] * * * could have been the result of a jury determination that while they were members of the enterprise, they did not participate in the arson-for-hire or insurance fraud schemes" (*id.* at A17).

ARGUMENT

1. Petitioners apparently no longer take the position that the present indictment is completely barred by their earlier acquittals. Instead, they argue (83-696 Pet. 4-10; 83-713 Pet. 5-11) that the inclusion in the indictment of the 1973 Massaro homicide as a predicate act of racketeering is barred on double jeopardy grounds because it could have been charged as a predicate act in the 1976 indictment. Their argument rests on the premise that the two indictments involved a single enterprise having diverse criminal objectives. As we show below, however, the Massaro homicide in fact bore no relation to the enterprise charged in the 1976 indictment — which was separate and distinct from the enterprise alleged in the instant indictment — and therefore could *not* have been charged there as a predicate act of racketeering.

The court of appeals correctly found (Pet. App. A16) that the present indictment and the 1976 indictment charged "wholly different" enterprises. The term "enterprise," as used in 18 U.S.C. 1961(4), denotes an organizational unit consisting of a group of individuals that is defined by reference to the common purpose or objective for which they have joined together. See *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). Here, the alleged enterprises had

clearly distinct objectives; the objective of the enterprise charged in the instant indictment was to extort money from gambling clubs, whereas the objective of the enterprise charged in the earlier indictment was to commit arson and insurance fraud.[2] Moreover, the membership of the two enterprises was significantly different; of the 18 persons indicted in 1976 and 1982, only the two petitioners were named in both indictments. And, with the exception of a single act of arson alleged as a predicate act in the 1982 indictment (committed five years after the last arson charged in the 1976 indictment and for the purpose of advancing the extortion rather than the insurance fraud scheme), the two enterprises engaged in altogether different acts of racketeering. Although the lives of the enterprises did overlap for about two and one-half years, the evidence clearly supports the court of appeals' determination that the enterprises constituted two separate entities.

It is the government's theory in this case that Massaro was murdered because he had breached the rules of the enterprise by engaging in bookmaking activities not sanctioned by the enterprise. The murder thus related solely to the extortion scheme that was the objective of the enterprise charged in the presently pending indictment, and was entirely unconnected to the enterprise charged in the 1976 indictment and its arson and insurance fraud scheme. Hence, contrary to petitioners' claim, there was no basis for charging the Massaro murder as a predicate act in the 1976 indictment.

In support of their argument that the two indictments involved a single enterprise, petitioners attempt to draw an analogy to non-RICO conspiracy cases, such as *United*

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[2]The enterprise alleged in the 1976 indictment was defined as "[a] group of individuals associated in fact to commit arson and to defraud certain insurance companies" (C.A. App. 30, 37).

States v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975), and *Short* v. *United States*, 91 F.2d 614, 624 (4th Cir. 1937), which hold that the government may not make multiple indictments out of a single conspiracy by alleging different overt acts. However, in *Mallah* and *Short* the object of the conspiracies charged in successive indictments was the same: to traffic in narcotics in *Mallah* and to unlawfully distill, conceal, and remove spiritous liquors in *Short*. Thus, in those cases the overt acts charged in the second indictment clearly could have been charged in the first without changing the nature of the conspiracy. Here, by contrast, the two alleged enterprises encompassed wholly different objectives and the Massaro murder could not, consistent with the objective of the earlier enterprise, have been charged as a predicate act of racketeering in the 1976 indictment. See *United States* v. *Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) ("the nature of the misconduct often provides the best clue toward defining the enterprise").

Nor are petitioners aided by *Sanabria* v. *United States*, 437 U.S. 54 (1978), upon which they also rely. In that case Sanabria and others were charged with conducting an illegal gambling business, in violation of 18 U.S.C. 1955. The indictment alleged that the illegal gambling business involved numbers betting and betting on horse races in violation of Massachusetts law. After the defense rested, the trial court granted a defense motion to exclude all evidence of numbers betting and then granted a motion to acquit Sanabria because of lack of evidence of his connection with horse betting. This Court held that the exclusion of the numbers betting evidence had been erroneous, but concluded that the government could not retry Sanabria on the numbers portion of the indictment. The Court explained that the indictment charged only a single gambling business and that the discrete violations of state law that the business

may have committed were not severable in order to avoid the Double Jeopardy Clause's bar against retrials for the same offense. 437 U.S. at 69-74. But here, the government did not charge petitioners' extortion activities as part of the 1976 indictment, nor has it ever contended that the arson and insurance fraud activities alleged in the 1976 indictment and the extortion activities alleged in the present indictment were committed in furtherance of the same enterprise. Accordingly, *Sanabria* provides no basis for excluding the Massaro murder from the present indictment on double jeopardy grounds.

Finally, petitioners rely on several cases holding that a single RICO enterprise may encompass numerous diverse and unrelated criminal objectives. See, *e.g., United States* v. *Weisman,* 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980); *United States* v. *Elliott,* 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Petitioners' point seems to be that the government could have defined the enterprise charged in the 1976 indictment in such a way as to permit the inclusion of the Massaro murder as a predicate act of racketeering. However that may be, nothing in any of the RICO cases cited by petitioners remotely suggests that, by failing to do so, the government precluded itself from alleging the Massaro murder as a predicate act in a subsequent RICO prosecution against them involving a criminal scheme wholly distinct from that charged in the 1976 indictment.

Clearly, there is no reason to believe, as petitioners suggest, that the government deliberately "carved up" a single RICO enterprise in the 1976 indictment in order to facilitate future RICO prosecutions against petitioners. The 1976 and 1982 indictments were separated by six years and, if petitioners had not been thought to have participated in extortion activities in the interim, the second RICO prosecution would never have been brought. Moreover, at the time of the 1976 indictment, *Weisman, Elliott,* and the other

RICO cases cited by petitioners had not yet been decided, and it was altogether unclear whether a single RICO enterprise could encompass diverse and unrelated criminal objectives. See *United States* v. *Ingman*, 541 F.2d 1329 (9th Cir. 1976) (decision to indict for separate conspiracies not made in bad faith or intended to harass). In short, petitioners' double jeopardy claim must fail.

2. Petitioner Marino also contends (Pet. 11-12) that the government is collaterally estopped by his 1976 acquittals from proving that he participated in the enterprise charged in the present indictment from 1971 to 1973.

In *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), this Court held that the doctrine of collateral estoppel precludes the government from relitigating an issue of ultimate fact involving the same parties that was *necessarily* determined in favor of the defendant in an earlier prosecution. Here, petitioner Marino asserts that his acquittal on the 1976 RICO charges necessarily meant that the jury concluded that he was not a member of the enterprise charged in that indictment. Based on the premise that the enterprises charged in the two indictments were the same, he argues that the government is precluded from relitigating his membership in the enterprise from 1971 to 1973, the period during which the lives of the two enterprises overlapped.

In the first place, as we already have shown and as the court of appeals concluded (Pet. App. A16), the two enterprises were not the same. Accordingly, even if the jury's acquittal of petitioner Marino in 1977 necessarily amounted to a finding that he was not a member of the enterprise charged in that case, the government would not be estopped in any way from proving that he participated in the enterprise charged here.

In any event, the 1977 acquittal did not necessarily amount to such a finding. Marino's acquittal could plausibly have been the result of a jury determination that, while Marino was a member of the enterprise, he did not participate in or agree to participate in any of the acts of racketeering enumerated in the indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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